

STATE OF MICHIGAN  
IN THE SUPREME COURT

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Appeal from the Court of Appeals

Panel: Neff, P.J., Murphy and Griffin, JJ.

CRAIG A. KLAPP,

Plaintiff/Appellant,

v.

UNITED INSURANCE GROUP  
AGENCY, INC.,

Defendant/Appellee.

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Supreme Court Case No. 119175-6

Court of Appeals Docket No. 219330

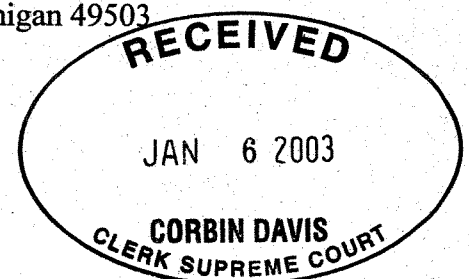
Consolidated with Docket No. 219299

Van Buren Circuit Court  
Case No. 97-043305-CK

**APPELLANT'S REPLY BRIEF**

**ORAL ARGUMENT REQUESTED**

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## REPLY ARGUMENT

A.     The Best-Case Scenario for UIG is that the Contract is Ambiguous.

The proper starting point for analysis of this case, Appellant Klapp submits, is the simple observation that the Agent's Agreement refers to the Agent's Manual for the *definition* of "retirement." (13a.) To define a term is to state its meaning, and the Agent's Manual states that "retirement" means "disengagement from the insurance industry." (8a.) Certainly, UIG could have chosen to define the term in a variety of other ways, so as to prevent an agent from retiring and un-retiring (as UIG describes in its brief), but Klapp indisputably satisfied the definition that UIG did in fact opt to use.

The Agent's Agreement does not, however, even purport to refer to the Agent's Manual for the *vesting rights* of a person who retires. Rather, those rights are set forth in the actual contract, section 5, with the prefatory language: "Commissions shall be vested in the following manner...." (12a.) And the Vesting Schedule in paragraph 5(B) thereafter grants Klapp vesting at 100% for seven years of service.

UIG tries to confuse this straightforward analysis by contending that the "complete" definition of retirement includes 10 years of service and attaining age 65. But the language in the Agent's Manual belies this contention. The language states: "Vestment for retirement is age 65 or 10 years of service whichever is later." (8a.) This language does not purport to *define* "retirement" or to state the meaning of "retirement." Rather, it purports to state the time at which a retired person will receive "vestment." And to the extent that

“vestment” is something other than an article of clothing, this language conflicts with the contrary “vesting” rights in the actual contract, giving rise to the ambiguity that the jury resolved in favor of Klapp.

But all of this ambiguity analysis gives UIG, the drafter of the contract, more than it deserves under the law. As the Court has stated in the context of a construction subcontract, and which is equally applicable here, “the true rule, based on sound reason and supported by the greater weight of authority, is that in the case of subcontracts, as in other cases of express agreements in writing, a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified.” *Arrow Sheet Metal Works, Inc v Bryant & Detwiler Co*, 338 Mich 68, 78; 61 NW2d 125 (1953). *Accord Berkel & Company Contractors v Christman Co*, 210 Mich App 416, 419; 533 NW2d 838 (1995). Here, the Agent’s Agreement refers to the extraneous Agent’s Manual for the particular purpose of defining “retirement.”<sup>1</sup> The Agent’s Manual thus becomes a part of the contract only for that purpose. In contrast, nothing in the contract purports to incorporate the Agent’s Manual for “vesting” or “vestment” rights. Section 5 of the contract, and the Vesting Schedule in particular, define those rights, which is precisely how UIG management explained it to Klapp when he signed the contract. (90-91a.) Viewed on this level, there is no ambiguity at all because the age 65/10 year language, although

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<sup>1</sup>In other sections, the contract refers to the Agent’s Manual for other purposes as well, which are not relevant to the issue before the Court. No provision in the actual contract, however, purports to make a wholesale incorporation of the Agent’s Manual into the contract for any and all purposes.

appearing in the extraneous document, is not a part of the contract, and the trial court's judgment in favor of Klapp was all the more proper.

B. UIG's Attempt to Defend the Error of the Court of Appeals Does Not Withstand Scrutiny.

The president of UIG, Patrick Patterson, testified that UIG's contract provides vesting at the 100% level for agents who die or become disabled, and that the lower percentages in the Vesting Schedule are *not* applicable to such agents.

The Court: So, this chart doesn't really, this renewals vested [in the Vesting Schedule] doesn't have anything to do with death or disability, those are 100%?

The Witness: That is correct. (92a.)

This testimony explains section 5(A) of UIG's contract, which provides that "upon" the death or disability, such agents shall be "entitled to receive one hundred percent (100%) of such renewal commissions then payable from premiums on Agent's policies in place, in such amounts as would otherwise have been payable to Agent...." (12a.)

Thinking that it knew better than the parties themselves, the Court of Appeals overlooked both the president's admissions and section 5(A) and declared that the lower percentages in the Vesting Schedule applied to agents who died or became disabled. Through this error, and without ever addressing the testimony or section 5(A), the Court of Appeals went on to declare that the Vesting Schedule was not inconsistent with, and did not contradict, the age 65/10 year language in the Manual.

In this Court, UIG similarly ignores the testimony from its own president -- it does not even attempt to address that testimony in its brief. Rather, UIG contradicts its own witness and attempts to defend the Court of Appeals by arguing that section 5(A) does not provide 100% vesting. Instead, UIG's new position is that the reference to "100%" in section 5(A) means "100% of the then vested amount" as set forth in the Vesting Schedule, UIG Brief at 22, or "100% of the percentage payable pursuant to the Vesting Schedule." UIG Brief at 32.

UIG's new position does not withstand scrutiny. First, section 5(A) does not state what UIG now wants it to state. The actual language is "one hundred percent (100%) of such renewal commissions then payable from premiums on Agent's policies in place, in such amounts as would otherwise have been payable to Agent...." (12a.) The phrase "amounts as would otherwise have been payable to Agent" can only refer to amounts the agent would have received but for the event in question, namely, the event of death or disability. No wording in Section 5(A) purports to link the reference to "100%" to the Vesting Schedule.

Second, if, as UIG now contends, section 5(A) means 100% of the Vesting Schedule percentages, then section 5(A) is surplusage. The Vesting Schedule itself grants vesting rights at 100% of the specified percentages. If section 5(A) is read to mean that the agent gets 100% of those percentages, then section 5(A) adds nothing and is meaningless.

And third, the only reference in section 5(A) to the Vesting Schedule is in the last sentence, which states: "If upon the date of death, disability, or retirement, Agent shall

have aggregated eight (8) or more years of service under this Agreement, his then [sic] vesting shall be determined in accordance with the normal vesting schedule.” (12a.) If, as UIG now contends, the earlier reference to “100%” means 100% of the Vesting Schedule percentages, then this last sentence is also meaningless because, according to UIG, the agent is entitled to 100% of the Vesting Schedule percentages regardless of his or her years of service, whether the years of service is 2, 8, or any other number. Thus, the last sentence, which plainly refers to the Vesting Schedule for agents with eight or more years of service, would add nothing.

Accordingly, UIG cannot successfully defend the error of the Court of Appeals. Section 5(A) means precisely what UIG’s president admitted that it means -- agents who die or become disabled are 100% vested, and the lower percentages in the Vesting Schedule do not apply to them. The Court of Appeals therefore erred by overlooking section 5(A) and the president’s testimony, and by then declaring that the lower percentages apply to deceased or disabled agents. The resulting conflict between the Vesting Schedule and the age 65/10 year language in the Manual, assuming the conflicting language in the Manual was incorporated as part of the actual contract, was properly resolved at trial by the finder of fact.

C. UIG’s Additional Arguments.

UIG raises a number of additional arguments that, Klapp submits, merit little discussion:

1. At pages 11-15 of its brief, UIG attacks wording in the trial court’s order to the effect that the question of ambiguity is an issue for the jury. Klapp agrees with UIG that



the initial determination as to whether a contract is ambiguous is a question of law for the court, not a question of fact for the jury. Klapp has never argued otherwise. But any error in the trial court's order was completely harmless. The contract is ambiguous, and the trial court actually sent the case to the jury for interpretation of that ambiguous contract in light of the extrinsic evidence. Despite the incorrect language in its order, the trial court actually handled the case in the correct manner.

2. At pages 18-19, UIG argues that Klapp is relying on an oral modification to the contract. Klapp is doing no such thing. Klapp simply claims that the contract, at a minimum, is contradictory and ambiguous, and that the contradiction was properly submitted to the jury for resolution based on extrinsic evidence. In addition to UIG's decade-long course of dealing, the extrinsic evidence included statements made to Klapp by UIG management at the time of signing. UIG never challenged the admission of those statements on appeal. Although UIG contends that this evidence came to light "for the first time at trial," UIG Brief at 17, the fact of the matter is that UIG simply neglected to ask Klapp about this issue when it took his deposition and therefore did not learn of the evidence earlier.

3. At page 24, UIG argues that the first of two conflicting clauses in a contract should control. UIG never raised this issue in the trial court, in proposed jury instructions, or in the Court of Appeals, but instead refused to acknowledge any conflicting clauses in the contract. But if this issue had been preserved for appellate review, the rule advocated by UIG supports Klapp, not UIG. The Vesting Schedule is the first of the two conflicting clauses, whereas the age 65/10 year language appears much later, buried near the end (on page 27) of a

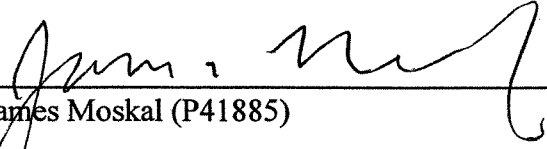
separate, lengthy document. Under the authority that UIG itself cites, the Vesting Schedule should control over the contrary language appearing later.

4. At pages 26-27, UIG argues that the case is moot because Klapp recently reentered the insurance industry. Klapp concedes that he is not entitled to any renewal commissions from the time he reentered the industry, because he is no longer retired as defined in UIG's contract. But that does not render the case moot. At issue are the substantial renewal commissions awarded Klapp by the jury, which covered the period from August 1997 to January 1999, and the renewal commissions from January 1999 until the time Klapp reentered the industry in approximately mid-2002.

5. Finally, beginning at page 27, UIG, citing a case from Delaware, argues that "ambiguity in the terms of the agreement, if any, should be construed against the drafter, to the extent such a construction is reasonable." UIG Brief at 30. As Klapp explained in his original brief, Klapp believes that extrinsic evidence should be considered, and that the ambiguity should be construed against the drafter as a rule of last resort. But either way, the trial court's judgment in favor of Klapp should be reinstated. The extrinsic evidence wholly supported Klapp, as the jury so found, and construction against the drafter fully supports Klapp as well. However, the qualification to construction against the drafter that UIG urges – "to the extent that such construction is reasonable" -- is not supported by any citation of authority. In every case of conflicting contractual provisions, one provision must yield to the other. Here, the jury found that the age 65/10 year language must yield to the Vesting Schedule, and an construction of the contract against UIG as the drafter gives the same result.

Dated: January 3, 2003

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